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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RICHARD DILLON,

Petitioner

V.

STATE OF INDIANA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by that court in Cause No. 282 S 67.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 454 N.E.2d 845 and may be found in Petitioner's Brief as Appendix "A".

STATEMENT OF THE CASE

Petitioner was charged by information and convicted of Burglary, Conspiracy, and two Counts of Murder, and by information the state charged the statutory aggravating circumstances of knowing and intentional killing in the course of the enumerated felony of burglary, and of committing more than one murder.

The facts of the crime were that Dillon and another planned to break into the home of an elderly couple, William and Mary Hilborn, because they had heard that the victims kept a large amount of money in their home. Dillon and his accomplice broke into the home with the intention of stealing the money. While they were in the home, Mr. and Mrs. Hilborn returned. Dillon and his accomplice hid, and although they had an opportunity to leave the house before committing the murders, decided it would be advisable to kill the couple to prevent their being witnesses. The killing was committed by

Petitioner, who stabbed the old couple several times. Mrs. Hilborn was slashed in several places on her neck and hands in an effort to torture her into revealing where the money was kept. The evidence showed that Mr. Hilborn struggled with Dillon and tried to defend himself with a club. He had a severe wound in the abdomen, and apparently received a fatal wound in his heart while attempting to go to the aid of his wife. Mrs. Hilborn died of a severe stab wound in the stomach and a fatal stab wound in her back. Although the victims were known to have recently cashed their monthly retirement checks a few days earlier, there was no money found in the house.

One of Petitioner's issues concerns the taking of his incriminating statement. The facts regarding the taking of that statement were as follows:

Petitioner made a statement to a detective on March 8, 1981, which another investigator felt was incorrect. A police officer had seen Petitioner near the scene of the murders, and Petitioner was considered to be a potential witness, not a suspect. An investigator went to Petitioner's house and said they wanted to talk to him. He informed Petitioner that he did not have to go to the station if he did not want to. Petitioner agreed to go. He was not handcuffed.

Petitioner taped a statement. The investigators concluded that statement was not truthful. Petitioner was advised that they were discussing the crime of murder but the ultimate charge brought would be up to the prosecutor. Petitioner asked that the prosecutor be contacted so he could know the charges he was facing. The prosecutor was contacted. Before the prosecutor could get to the sheriff's office, Petitioner said to an officer, "Hell, we did it," and started crying.

Petitioner then agreed to give another statement. He was advised of his rights and signed a waiver of rights form, an then gave a statement. He was twice advised that he could have a lawyer present, but explicitly declined to have a lawyer come.

The officers made no promises or threats and there was no physical coercion. The whole process took around two and a half hours, and occurred in an unlocked office with comfortable furniture. Petitioner was not put in the jail portion of the building. He did not ask for food, but was given a soft drink. Petitioner was formally arrested after giving the second statement.

Petitioner claims to have smoked some marijuana and consumed two Quaaludes on the date of the statement. The officers testified that Petitioner did not seem to be under the influence of drugs at the time.

Petitioner also alleges incompetent representation of counsel. Trial counsel himself had alleged to the trial court and in post-trial proceedings stated in an affidavit reasons why he felt his representation of Petitioner was incompetent. He stated that the incompetent representation was due to his inability to prepare adequately, and cited three personal matters as the basis for this inadequacy: His recent divorce, the injury of his brother, and the imminent death of his father. He alleged that he reviewed the case with defendant for less than four hours from the time of the arrest to the trial.

These allegations are repeated in the instant Petition. Petitioner also alleges that the trial counsel failed to submit any proposed final instructions to the court.

The record shows the following facts as to these allegations:

A hearing was held on the counsel's motion for continuance based on these factors, and defendant was asked if he wished counsel to withdraw. Defendant answered that he was aware of the circumstances but that he did not wish the attorney to withdraw. Counsel's wife had filed for divorce one month before counsel entered his appearance in the case, and the divorce was final eighty-nine days before trial. The father's illness had been long-standing, and his death did not occur until forty-seven days after trial began. The record

also shows that Petitioner's trial counsel prepared and tendered to the court eleven proposed preliminary instructions, but these were either withdrawn or refused as covered by the court's own instructions.

The record shows that during the trial preparation phase of this case counsel had numerous meetings to consult with the prosecuting attorney prior to trial, sought and obtained a change of venue, interviewed witnesses, subpoenaed and presented witnesses on Petitioner's behalf, requested and received full discovery before trial and viewed all the State's physical evidence, read and copied the grand jury testimony, filed an alibi notice and presented evidence on the alibi defense, filed a writ of habeas corpus, filed and argued a motion to suppress the confession, conducted cross-examination, attended omnibus hearings, viewed the list of prospective jurors, and consulted with co-defendant's attorney. Counsel visited the Pike Count jail ten to fifteen times during the 27 days Petitioner was confined there, and conferred with Petitioner on four occasions in the Court's jury room for periods of forty to sixty minutes each.

Defendant was convicted of all four counts, and after a separate penalty phase hearing, the jury recommended the death penalty. The trial court imposed the death penalty and announced his reasons therefore in written findings. Petitioner pursued his direct appeal to the Indiana Supreme Court, which affirmed his conviction.

Petitioner filed his Petition for Certiorari in this Court on January 20, 1984. Petitioner also filed a motion for leave to proceed in forma pauperis, and submitted his petition in the form permitted by this Court's rules for pauper petitions.

STATEMENT OF ISSUES PRESENT FOR REVIEW

The Petitioner raises four issues as reasons for granting the writ. In the order he presents them, they are:

1. Whether he received inadequate assistance of counsel at trial.

2. Whether the circumstances of giving his inculpatory statement were such that the statement should have been excluded as the product of an involuntary custodial interrogation.

3. Whether it is impermissible in the penalty phase to allow the introduction, over objection, of defendant's own testimony in the guilt phase of his trial.

4. Whether the trial court's written findings were inadequate as failing to include his specific finding that the statutory aggravating circumstance was proved beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

I. A trial counsel's assertion of incompetent representation should not be treated as conclusory on a Sixth Amendment allegation. Instead, an appellate court should consider the totality of the circumstances of representation as shown by the record and determine if a defendant's representation was within the range of competence demanded of attorneys in such a criminal case. Despite some personal difficulties which befell counsel, the record does not show that counsel's performance fell below that range.

II. The totality of the circumstances shows that Petitioner voluntarily accompanied police officers to the police station for purposes of discussing a statement and knew he did not have to go with them. Thus, the inculpatory statement he made was not a result of an illegal arrest, and was properly not excluded.

III. Once a verdict of guilty has occurred at a trial, no further incrimination can occur. Thus, the fact finder's use in a subsequent sentencing phase of defendant's testimony as part of the guilt-phase evidence does not infringe the right against involuntary self-incrimination.

IV. The trial court's written finding, contrary to Petitioner's contentions, did find beyond a reasonable doubt the existence of two statutory aggravating circumstances.

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAS NOT DENIED ADEQUATE REPRESENTATION OF COUNSEL

Petitioner predicates his grounds of inadequate representation of counsel on two cases: that trial counsel himself introduced an affidavit stating that he was incompetent, and that counsel did not tender final instructions or object to the instructions which were delivered by the court. Appellant does not suggest any manner in which the court's instructions were incomplete or erroneous, nor does he suggest what instructions the trial counsel should have made. He also alleges in a general manner that the counsel did not adequately prepare for trial, but does not state any particular action or inaction occurring at trial as a result of that alleged lack of adequate preparation.

Since Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) it has been clear that the Sixth Amendment's provision that accused in all criminal prosecutions shall enjoy the right to the assistance of counsel for his defense applies to the state courts through the Fourteenth Amendment. In the context of evaluating guilty pleas, this Court had made it clear that this guarantee might be shown to have been violated where a prisoner shows that his attorney's advice is not "within the range of competence demanded of attorneys in criminal cases", McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235.

It has fallen to lower federal courts and state courts to articulate what the "range of competence" is that is "demanded of attorneys in criminal cases." Several Federal Circuit Courts of Appeal have retained as a standard that to show

incompetence a defendant must show that the level of representation was such to render the trial a "farce or mockery" or a "sham". E.g. Brinkley v. Lefevre, (1980, 2nd Cir.) 621 F.2d 45, cert. denied, ___ U.S. ___, 101 S.Ct. 203, 66 L.Ed.2d 87; Marzullo v. Maryland, (4th Cir. 1978), 572 F.2d 57, cert. denied, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394. Indiana's Federal Circuit has held that the Constitution guarantees a defendant legal assistance which meets a "minimum level of professional representation". This holding was in a decision which stated that the court's inquiry goes beyond the question whether the state court trial had been a sham or mockery, United States ex rel. Williams v. Twomey, (1975, 7th Cir.) 511 F.2d 634; an inquiry which requires an examination of "the totality of circumstances in the particular case." United States ex rel. Heral v. Franzen, (1981, 7th Cir.) 667 F.2d 633.

The burden of showing ineffective representation is on the defendant. United States v. Fleming, (1979, 7th Cir.) 594 F.2d 598, cert. denied 442 U.S. 931, 99 S.Ct. 2863, 61 L.Ed.2d 299 (1979).

Indiana's Supreme Court has, of course, followed the requirements of the Seventh Circuit. It has stated that its standard of "farce and mockery" had been "modified by the standard of adequate legal representation", see the decision in this case (454 N.E.2d 845); also Hollon v. State, ___ Ind. ___, 398 N.E.2d 1273.

The issue is whether the trial counsel's affidavit, unsupported by any instances of specific failure at trial, and demonstration of a decision not to render final instructions, without an allegation of any harm resulting, can meet the Petitioner's burden of showing that his trial counsel was inadequate.

In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) this Court dealt with the issue of effective representation of counsel in the context of a claim of

conflict of interest arising from a situation of joint representation. In that case it was held:

> But until a defendant show that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance [citations omitted]
>
> * * *
>
> In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

446 U.S. 350, 100 S.Ct. 1719.

Cuyler cited the earlier case of Dukes v. Warden, 406 U.S. 250, 92 S.Ct. 1551, 32 L.Ed.2d 45 (1972), also a conflict in representation case, which had held that where defendant did not identify an actual lapse in representation, denial of a writ for habeas corpus was affirmed.

The Cuyler case principle, that a petitioner must demonstrate the actual failure in his criminal trial representation to be entitled to relief from this court, should apply in general to allegations of incompetent representation of counsel.

The Indiana Supreme Court's holding in the instant case was an expression of the Cuyler principle. It held that without a factual showing of instances in which the personal problems which the trial counsel had endured during this period of time, and without a demonstration that the trial court's instructions were such as to require objections or supplementation by tendered instructions, it would not find incompetence.

(Petitioner cites Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) for the proposition that this Court "held that the advice of an attorney to not submit instructions may be 'outside the "range of competence demanded of attorneys in criminal cases".'" In fact, Tollett says nothing at all concerning a decision of counsel not to submit instructions. It is difficult to see how it could have, since the Tollett case involved a guilty plea and never reached a jury.)

The State court decision made it clear that an allegation of incompetence would be tested by consideration of the totality of the circumstances surrounding counsel's pretrial preparation and the actual conduct of the trial, even where the allegation of incompetence is made at trial and on appeal by counsel himself. In short, the Indiana Supreme Court has refused to hold that a defense counsel's affidavit of his own incompetence is conclusory on the issue of adequacy of representation or shifts the burden of proof on that issue; the court will, despite such a statement, inquire as to the actual preparation and conduct of the trial, and assess it according to the "mockery of justice test as modified by the adequate legal representation standard." 454 N.E.2d 845; Hollon v. State, ___ Ind. ___, 398 N.E.2d 1273.

Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981), cited by Petitioner, does not establish that any conclusions or lesser burden of showing inadequacy of trial representation is created by counsel's affidavit of his own incompetency. The facts, contrary to Petitioner's view, are not closely analogous. In Kemp, the Circuit Court did find incompetence where, inter alia, counsel filed such an affidavit. But in the Kemp case there was much more, including the fact that the murder trial involved was counsel's first unassisted criminal case; that counsel had failed to interview a single adverse witness, failed to call a single one of the character witnesses who were present in court at defendant's request, failed to investigate, failed to discuss possible defenses with the accused, and failed to offer a voluntary manslaughter instruction when the facts might have warranted such an instruction. In addition, he failed to adequately inform his client as to degrees of homicide and risks of proceeding to trial before rejecting on is client's behalf an offer of a plea on voluntary manslaughter. It is clear from the Fifth Circuit's decision in Kemp that their decision upholding habeas relief was based on these specific allegations of failure, supported by the record. Thus,

trial counsel's agreement that he was incompetent was just one of the factors considered. As the Kemp decision stated, the incompetent representation was determined "under the totality of these circumstances."

Appellant also cites Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) for a holding that "where preparation for a murder trial was not adequate, effective counsel is lacking", citing page 966 of that opinion for that principle. (Petition, page 5) Stanley does hold that "[w]ere trial counsel for a capital defendant to testify that he had no strategy whatever for the sentencing phase and that he failed to consider or develop possible mitigating evidence, then such counsel must be deemed ineffective." This holding, when read in light of the case it cited, Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982) is clearly applicable to situations where counsel did not follow a certain line of investigation, and there were other plausible lines of defense that he did pursue. Then the inquiry is whether the abandonment of the one line of defense was made on a strategic basis. Where there actually is a choice of strategies, the counsel will be presumed to have made his choice on strategic grounds. But this presumption can be rebutted by counsel's credible testimony at an evidentiary hearing that his choice was not based on strategic grounds, or where his actions did not conform to a general pattern of rational trial strategy.

Thus, the Strickland case, cited by Stanley, still requires a factual showing of the failure of counsel to take certain specific actions before the presumption of his competence can be rebutted. The Strickland facts do not apply here, where Petitioner makes no claim as to any line of investigation that counsel is supposed to have neglected.

Going back to Stanley v. Zant, we note that the 11th Circuit reaffirmed the principles that:

> [A] petitioner asserting that counsel failed to conduct an adequate pretrial investigation has the initial burden of making a dual showing. As a threshold requirement,

> he must show that his counsel was in fact ineffective, that counsel's conduct was not within the "range of competence demanded of attorneys in criminal cases" [citations omitted]. This is an objective assessment of whether trial counsel fell below acceptable professional standards in not advocating the underlying claim. This portion of the analysis may ask, for example, whether counsel conducted a reasonable pretrial investigation and whether counsel's failure to investigate certain lines of defense was part of a strategy based on reasonable assumptions. A petitioner has the additional burden of proving that his counsel's ineffectiveness caused "actual and substantial prejudice" to his case.

697 F.2d at 958.

The alleged failure of defense counsel in Stanley was in not giving any mitigating evidence at the penalty phase of a capital trial. The Circuit Court reiterated that the petitioner's burden was "to show that his counsel was not rendering reasonably effective assistance given the totality of the circumstances." 697 F.2d at 962.

It is clear from the decision of the Supreme Court of Indiana in the instant case that it considered the totality of the circumstances, including the trial counsel's affidavit showing the personal reasons he felt his assistance was ineffective. We do not concede that that Court failed to give the actions of counsel, in the face of such a self-critical affidavit, a "critical look". In its opinion in this case, found in the Petition at page 16 and following, the Indiana Court cited at length the circumstances it considered. These obviously included the allegations of counsel's affidavit, for the court showed what the record indicated on each of these allegations. This included the rather broad time-frame that the personal misfortunes befell the counsel (he was sued for divorce, for instance, a month before appearing in this case, and the divorce was final eight-nine days before trial). The Indiana Court also cites many actions performed on Petitioner's behalf by counsel. These include interviewing witnesses prior to trial, obtaining a change of venue, obtaining discovery, and viewing all the State's evidence and copying the grand jury

testimony, consulting with the alleged accomplice's counsel, frequently conferring with defendant at length, presenting a partial alibi defense, attending numerous pretrial proceedings, subpoenaing and presenting witnesses in defendant's behalf, and conducting extensive cross-examination and lengthy closing arguments. The Indiana Court concluded that "[i]n fact, the record shows that defendant had vigorous representation in the face of overwhelming evidence, including his own confession, against him."

Therefore, we believe that the Indiana Supreme Court's determination, upon consideration of the totality of the circumstances of Petitioner's representation (not just on the granting of a short continuance and Petitioner's decision to continue being represented by the counsel despite his pre-trial motion for withdrawal or continuance) was correct, and that no basis is shown on this issue for granting the writ.

II.

PETITIONER'S INCULPATORY
STATEMENT WAS PROPERLY ADMITTED

Petitioner asserts as grounds for relief that the trial court admitted into evidence a statement he made that he contends was the product of an unlawful detention.

The facts are that following a prior statement, police learned that defendant may have been near the scene and they wished to ask Petitioner some questions. Two officers went to his home and had Petitioner's brother call him over. The officers identified themselves and said they wanted to talk to Petitioner. They asked if he would come to the police station to talk about his prior statement concerning the day of the murder. He said "Sure", got a jacket from his room, and rode in the back of the police car (alone and not handcuffed). The officers specifically told the Petitioner that he did not have to come with them if he didn't want to, but he agreed to go with them.

The conversation occurred not in the jail portion of the police office, but in the sheriff's office, a room with

comfortable chairs. He signed a rights waiver form. He made a taped statement. After looking over the statement, the two officers told Petitioner they thought he was not truthful, and advised him they were discussing the crime of murder. The Petitioner asked to talk to the prosecutor. While one officer was calling the prosecutor, Petitioner looked at the other officer and said, "Hell, I did it." Petitioner was again advised of his rights, signed a second waiver of rights form, and gave the statement admitting his part in the murders. The whole period of questioning took two and a half hours. Defendant was free to leave at any time. The doors to the office were unlocked. He was never threatened or abused, and no promises of leniency were given. He did not ask for food. He was given a soft drink.

Petitioner seeks to compare this case to the facts in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824. In Dunaway, without probable cause, policemen had been ordered to "pick up" defendant. They found him in a neighbor's house and took him into custody. Although he was not told he was under arrest, he would have been restrained if he attempted to leave. Dunaway was never told that he was free to go.

In United State v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) a plurality of this court held that a person is "seized" only when, "by means of physical force or a show of authority, his freedom of movement is restrained." 446 U.S. at 553, 100 S.Ct. at 1877. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification," the plurality went on to say. Id. (The above principles were not disagreed with by the three Justices who concurred in he judgment; They did not occur in the finding that Mendenhall reasonably could have though she was free to walk away when asked for her driver's license and ticket. Thus, the fact that three justices did not

concur in this part of the plurality opinion did not necessarily imply disagreement with the views expressed therein. Concurring opinion of Justice Powell, 446 U.S. at 561, 100 S.Ct. at 1880, note 1.)

Mendenhall involved an airport stop of a person whose behavior "profile" matched that expected of a drug courier. It first discussed the consequences of her being stopped and questioned in the airport concourse; that is, without her having been taken anywhere. After that, Mendenhall was asked if she would go to the airport drug enforcement agency office, and she went with them, although not verbally assenting to that request. While in the office, she was asked to consent to a search, and informed that she had a right to decline the search if she desired. She responded "Go ahead."

The first question, then, was whether the trip to the office was an impermissible seizure of her person. This Court analyzed the question thus:

> The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances. Schneckloth v. Bustamonte, 412 U.S. at 227, 93 S.Ct. at 2047, and is a matter of which the Government has the burden of proving. Id. at 222, 93 S.Ct. at 2045, citing Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797. ... The Government's evidence showed that the respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers.

446 U.S. at 558-559, 100 S.Ct. at 1879. (This citation is found in part IIB. of the plurality opinion, in which the three Justices who only concurred in the results of part IIA joined. 446 U.S. 547, 100 S.Ct. 1873, note **.)

The Court held that the factors of her being a young black woman of limited education and thus feeling intimidated by the older, white, male officers were not irrelevant, but not

decisive, either, and concluded that the totality of the evidence was plainly adequate to support the lower court's ruling that Mendenhall voluntarily consented to accompany the officers to the DEA office.

Thus, this Court held, her subsequent consent to the search could not be contended to have been "infected by an unlawful detention". The other facts of the search, including being twice warned that she need not consent to it, represented "more than enough evidence" that her consent to search was voluntary. 446 U.S. at 559, 100 S.Ct. at 1879.

Here, Petitioner seeks to invalidate his twice-given execution of rights waiver forms, which were preceded by requisite warnings and advisements of rights and waivers, by showing that this consent was similarly "infected by an unlawful detention."

In fact, there is much more reason to conclude that he accompanied the officers voluntarily, and reasonably thought he was free to leave, than in the Mendenhall case. Petitioner had already given the police a prior voluntary statement, and was permitted to leave on that occasion. He was expressly told that he need not go to the sheriff's office with the policemen. He received all required advisements of rights and executed a waiver. He made a statement. Then, when it became apparent to him that the officers believed he was untruthful, he gave up the pretense. While the officers were responding to his request to talk to the prosecutor, he suddenly volunteered that he had done it. Before giving the next statement, he was again fully advised and gave his waiver of rights again.

There was no illegal detention in this case. The facts clearly support the trial court's and Indiana Supreme Court's conclusions that he voluntarily accompanied the police downtown with full knowledge that he need not do so. The facts show nothing intervened to render that statement the product of

an illegal custodial interrogation. There is no basis shown for granting the writ on the allegation of illegal seizure or involuntariness of the statement.

III.

THE INDIANA STATUTE DOES NOT VIOLATE A DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION

As is the case with many States' capital punishment statutes, Indiana's procedure is divided into two phases: a guilt-determination phase, and a sentencing proceeding. In the sentencing procedure, the same jury which convicted a defendant hears evidence and makes a unanimous advisory recommendation to the judge. The statute provides that "[t]he jury, or the court [if the guilt phase was a bench trial] may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence ...." IC 35-50-2-9(d).

Petitioner now seeks relief on a Fifth Amendment claim flowing from this statute. He voluntarily took the witness stand and testified in the guilt phase, thus waiving his right against self-incrimination. He contends that such waiver was effective only as to the guilt phase, and that the evidence given in his own testimony then should not have been admitted for consideration by the sentencer in the sentencing proceedings.

He ultimately decided to testify at the penalty phase but says now that this decision was "arguably" made only upon the trial court's granting of the State's motion to incorporate all trial evidence in the sentencing hearing. In making this assertion he seems to be contending that his decision to testify at sentencing should not be treated as a waiver of a right against self-incrimination at the sentencing hearing. However, we must note that neither in his direct appellate brief nor in

this petition does Petitioner allege that he ever actually objected to the State's motion to incorporate the guilt-phase evidence in the sentencing hearing or direct us to such an objection in the record.

Put more briefly, he contends that his right against self-incrimination was impermissibly infringed when his voluntary testimony from the guilt phase was ordered incorporated into the punishment phase evidence, because the guilt phase testimony contained his own testimony.

There is some novelty in this assertion, which is shown by the fact that Petitioner's only authority in this respect is to Reina v. United States, 364 U.S. 507, 81 S.Ct. 260 (1960), which he characterizes as holding as a general principle that the "constitutional protection no longer attaches after an accused testifies because the accused can no longer be incriminated by the former testimony." (Petition, p. 10). Actually, the Reina case notes that the petitioner therein had said the "the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime ***." 364 U.S. at 512, 81 S.Ct. at 264, emphasis added. (The Court concluded that Mr. Reina's assertion was backed by "weighty authority." Reina also noted that the Fifth Amendment did not protect a Federal witness from answering questions which might incriminate him under state law.)

Thus, he is not claiming that anyone forced him to abandon his right against self-incrimination in the guilt phase. He claims only that the consideration at the guilt trial whether or not to waive the privilege is burdened by the knowledge that the waiver will cause that evidence to be admitted in the sentencing phase.

This entire argument loses sight of an important factor. The sentencing hearing is simply a continuation of the same proceeding. It is no more a separate trial of guilt than

is the sentencing hearing in any non-capital case. The fact-finder's entire capacity to convict a defendant as to the crimes charged is already expended upon its verdict on guilt or innocence. On sentencing hearing the fact-finder does not determine guilt. Therefore, Petitioner is incorrect in his assertion that the use of the already-admitted evidence could possibly have any further incriminating effect. Since the earlier-phase testimony is not being used to find guilt, use of that testimony for a sentencing purpose does not involve self-incrimination.

In Gregg v. Georgia, supra, this court approved a capital sentencing statute which among other things provided a separate sentencing hearing in which evidence considered during the guilt stage could be considered during the sentencing phase without being resubmitted. 428 U.S. at 165, 96 S.Ct. at 2921; Brown v. State, 235 Ga. 644, 220 S.E.2d 922 (1975). Gregg, of course, upheld the constitutionality of this scheme.

In addition, the Georgia statute permits the introduction in the sentencing phase of "the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant". Ga. Code Ann. §§ 27-2503. A plea of guilty, of course, operate as a waiver of the right against self-incrimination. Thus, the Georgia statute permits not only the introduction of any self-incriminatory testimony the defendant may have elected to make at the guilt phase, but all waivers of self-incrimination that the defendant may ever have made in connection with a guilty plea. This provision of the Georgia statute was specifically upheld by this court in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, ___ L.Ed.2d ___ (1983).

The Court has stated as a general principle that "[w]e think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." Gregg, 428 U.S. at 203-204, 96 S.Ct. at 2939. This principle flows logically from the overriding concern expressed by this court in Gregg, that capital punishment determinations should be made based on an individialized determination of the nature

of the crime and the nature of the offender. These principles would seem to permit, if not compel, the sentencer to have before it all the facts adduced at the trial of guilt for the crime, including the testimony of the accused, should he freely decide to give it.

Thus, we believe that no constitutional violation has resulted from the trial court's admission of defendant's voluntary guilt-phase testimony into the later stage of the trial, and that petitioner is entitled to no relief as a result of that decision.

IV.

THE TRIAL COURT'S FINDINGS WERE NOT INSUFFICIENT

Petitioner's final contention is that the trial judge's findings were inadequate to support imposition of the death penalty. His basis for this claim is his view that the trial court judge did not directly state that he found the existence of any aggravating circumstance beyond a reasonable doubt.

The trial court specifically found that "the jury was justified in finding beyond a reasonable doubt the existence of the aggravating circumstances of an intentional killing of the victims while committing a burglary and that the defendant committed another murder." These were the only two aggravating circumstances alleged by the State.

The trial court went on the state specifically:

> In conclusion the court finds beyond a reasonable doubt that the aggravating circumstances of the intentional killing of the victims while committing a burglary and the defendant having committed two murders outweigh the mitigating circumstance ...

The Indiana Supreme Court, in reviewing this sentence, found that these findings were in accordance with the statute, IC § 35-50-2-9.

In fact, these findings do explicitly state that the court finds that aggravating circumstances exist, and what they are, and discusses the evidence the court relied upon in reaching that conclusion.

The requirement of Gregg and Proffitt that there be written findings of a trial court is in order to permit adequate appellate review of the sentence; for the appellate court to know on what basis the judge aggravated the sentence, and what facts supported the judge in so doing. The opinion of the trial court judge clearly stated what aggravating circumstances were proven, that they were proven beyond a reasonable doubt, and what the evidence was to support that finding. The Indiana Supreme Court concluded that this finding was adequate to allow it to review the sentence.

Thus, this court's requirements regarding findings of trial courts in capital cases have been met, and no reason is shown to grant relief on this issue.

CONCLUSION

Wherefore, Respondent respectfully submits that the issues alleged by Petitioner have been correctly disposed of in conformeter with the opinions of this Court and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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